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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-582

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

J. HENRY GLAZER, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

DAVID B. GOLD,
HERBERT W. YANOWITZ,
105 Montgomery Street, Suite 1100,
San Francisco, California 94104,
Attorneys for Petitioner.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Laurence H. Frommhagen, respectfully files a supplemental brief in support of his petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the grounds that because of his difficulties with his previous counsel, petitioner's present counsel did not have complete access to all of the records in this case. As a result, certain matters in the petition for writ of certiorari were not stated with complete accuracy and others were not included in the appendix.

JURISDICTION

In the Petition for Writ of Certiorari it was asserted that

the order of the Court of Appeals denying a petition for rehearing was entered on June 8, 1971, to be made effective on June 15, 1971. The latter statement was based upon a written communication received by petitioner from the Clerk of the U.S. Court of Appeals for the Ninth Circuit. That communication together with the court's order as well as all other records in the case were transmitted by petitioner in August of 1971 to Byron N. Scott, Esq., petitioner's previous counsel in this proceeding, who has refused to return these documents to petitioner. Petitioner's present counsel was unable to obtain the original file from said clerk before the Petition for Writ of Certiorari was filed and said clerk now states that a copy of the original communication is no longer available.

The Petition for Writ of Certiorari was not filed within ninety days after the date of the Court's order, dated June 8, 1971, because said Byron N. Scott, who had been retained by petitioner to represent petitioner in this action, represented to petitioner that the ninety days period did not begin to run until June 15, 1971.

Petitioner's counsel did not have any of the records which would have enabled his to discover the error. The said Byron N. Scott further represented to petitioner and to petitioner's present counsel that he, Scott, would file the petition on behalf of petitioner, but despite these represent ations, filed a rough draft of a petition marked 'pro se' with petitioner on September 6, 1971, the last day of the filing period. These actions and inactions on the part of the said Byron N. Scott prevented petitioner from filing a timely petition for writ of certiorari or obtaining an extension of time in which to file the petition before the ninety day period had elapsed.

By orders signed on September 27, 1971, and October 14, 1971 by the honorable WILLIAM O. DOUGLAS, Associate Justice of the United States Supreme Court, extensions of time in which to file the petition were granted without prejudice as to the Court's consideration of whether the petition was filed in time.

Petitioner has filed a grievance with the Committee on Admissions and Grievances of the United States District Court of the District of Columbia as well as a complaint in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, as to the failure of Byron N. Scott, Esq., to represent the petitioner and to file the petition for writ of certiorari within the ninety day limit. Both of these actions are now pending.

Dated, San Francisco, California,
November 23, 1971.
Respectfully submitted,

DAVID B. GOLD
HERBERT W. YANOWITZ,
Attorneys for Petitioner

Supplemental Appendix

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71 - 582

LAURENCE H. FROMMHAGEN, Petitioner

vs.

J. HENRY GLAZER, Respondent

The petitioner, LAURENCE H. FROMMHAGEN, being duly sworn according to law, deposes and says:

1. He is the petitioner in the above-entitled matter.

2. On November 12, 1971, he transmitted to the Committee on Admissions and Grievances of the United States District Court for the District of Columbia, a grievance wherein he alleges: (1) his previous attorney, Byron N. Scott, Esq., who had accepted a retainer from petitioner to represent petitioner in this action before the United States Supreme Court and who had repeatedly assured petitioner during the summer of 1971 that he would represent petitioner and would file a petition for writ of certiorari, informed petitioner on September 6, 1971, that he would not represent petitioner and would not file said petition, (2) the said Byron N. Scott misinformed petitioner as to when the ninety day period for filing said petition would begin to run, i.e., on June 15, 1971, and (3) the said Byron N. Scott has refused to

return to petitioner, for use by petitioner's present attorney, the records of the action in the courts below even though petitioner was represented by other attorneys in those matters.

Petitioner also filed on October 12, 1971, a complaint in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, wherein he prays for return of the fees, including the retainer, he paid to the said Byron N. Scott.

Both of those complaints are now pending. The trial in the Small Claims and Conciliation Branch has been set for February 21, 1972, over the protestations of petitioner who had asked for a much earlier hearing.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this 23rd day of November, 1971.

(his seal) /s/ John E. Nohrden
JOHN E. HOHRDEN

Notary Public In and For Said County and State

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAURENCE FROMMHAGEN,

Plaintiff-Appellant,

vs.

HENRY GLAZER, et al,

Defendants-Appellees.

Before: HAMLEY, DUNIWAY, and ELY,
Circuit Judges

ORDER

The petition for a rehearing is denied. Pursuant to Rule Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion of a rehearing in banc has been transmitted to all of the judges of the court who are in regular active service, but no member of the court has requested a vote on such suggestion. The suggestion of a rehearing in banc is rejected.

FILED

JUN 8 1971

WM. B. LUCK, CLERK

LAURENCE H. FROMMHAGEN
Pro Se
P.O. Box 326
Soquel, California 95073

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

LAURENCE H. FROMMHAGEN, Petitioner
v.
J. HENRY GLAZER, Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable WILLIAM O. DOUGLAS, Associate Justice of the Supreme Court of the United States:

LAURENCE H. FROMMHAGEN, being duly sworn, according to law, deposes and says:

1. He is the petitioner in the above-entitled matter and is making this affidavit in support of his application for an extension of time within which to file a petition for writ of certiorari.

2. On April 27, 1971, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming the judgment of the United States District Court for the Northern District of California which entered judgment against the petitioner. A copy of the opinion of the United States Court of Appeals is appended hereto as Exhibit A. A petition for rehearing was denied on June 8, 1971, to be made effective June 15, 1971.

3. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1).

4. Petitioner, a former research scientist at Ames Research Center, NASA, Moffett Field, California, filed a complaint against J. Henry Glazer, Chief Counsel at Ames Research Center, NASA, the respondent herein, alleging that respondent defamed the petitioner through a written communication to petitioner dated April 1, 1968, copies of which were disseminated in a blind fashion to various persons. The communication charged petitioner, among other charges, with being arrogant or stupid and further characterized petitioner as appearing through his writings as an "ego-centered hero". Petitioner contends that the communication was actuated by malice and was on its face a personal grievance which did not allege any impairment of agency efficiency. Summary judgment was entered for the respondent in the trial court on the ground that, as a matter of law, the respondent was immune from personal liability under the decision of this Court in *Barr v. Matteo*, 360 U.S. 564 (1959).

Petitioner contends that this is appropriate for certiorari on the following grounds:

(1) The Court of Appeals for the Ninth Circuit has decided an important question of law which has not been ruled upon directly by this Court, and should be, and has decided a federal question in a way which does not conform to the decisions of this Court in *Barr* v. *Matteo, supra.*, and *Howard v. Lyons*, 360 U.S. 593 (1959). Both of these cases left the question, which is becoming increasingly troublesome, as to how a court is to determine whether a defendant was acting within the outer perimeter of his official duties without taking some testimony to probe that question. In the instant matter the Courts below have denied petitioner the opportunity, guaranteed to him under due process of law, to

adduce testimony which would have established the non-official, malicious intent of respondent in disseminating his libelous matter to a wider audience than he has admitted. Therefore, the summary judgment entered in behalf of the respondent was inappropriate and improper.

(2) The Court of Appeals for the Ninth Circuit failed to recognize that personal grievances unrelated to the efficiency of the federal service, such as the respondent's letter to petitioner of April 1, 1968, are governed not by *Barr v. Matteo supra.*, but rather by the decision of this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), by the decision of the United States Court of Appeals for the District of Columbia in *Meehan v. Macy*, 392 F. 2d 822 (1968), and by the United States Court of Claims in *Swaley v. United States*, 376 F. 2d 857 (1967). The latter line of cases, which follow from the decision of this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), hold that a personal grievance enjoys only a qualified privilege which can be defeated by a showing of malice.

5, Petitioner has had but limited legal experience and believes that if his cause before this Court is to be successful he must be represented by competent counsel.

6. Petitioner requests an extension of time because, although he retained the Honorable Byron N. Scott, Washington, D.C. for the purpose of representing him in this Action, and although the said Byron N. Scott repeatedly assured petitioner that he would represent petitioner and would file the Petition for Writ of Certiorari, the said Byron N. Scott suddenly and inexplicably informed petitioner on September 6, 1971,that he would not represent petitioner and would not file said petition. All that petitioner has received from Byron N. Scott is a rough draft of the proposed petition in the form of a *pro se* petition transmitted by Byron N. Scott on September 3, 1971, and claimed by petitioner from his post

box on September 6, 1971. Petitioner had communicated his uneasiness as to the fast-approaching expiration of the time limit for filing of said petition to Herbert W. Yanowitz, Esq. (whose affidavit is appended hereto as Exhibit B) on September 1, 1971.

7. Petitioner has communicated with an attorney in San Francisco, California, who has agreed to represent petitioner and file a petition for a writ of certiorari in an extension of time granted by this Court. Said counsel has indicated that the rough draft of the petition transmitted to petitioner by Byron N. Scott is inadequate, that further matters should be alleged in the petition, and that the filing of the petition would not be frivolous.

8. Petitioner accordingly needs an extension of time to and including September 30, 1971, within which to have the said petition filed.

WHEREFORE, your affiant respectfully prays that this Court enter an order extending the time within which the affiant may file a petition for writ of certiorari from the decision of the United States Court of Appeals for the Ninth Circuit to and including September 30, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

Dated: September 9, 1971

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this ninth day of September, 1971.

/s/ Eva Busch
Notary Public in and for said County
(her seal) and State

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he transmitted by mail a fully conformed copy of the foregoing APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI to the United States Attorney, 450 Golden Gate Avenue, San Francisco, California, on September 9, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

EXHIBIT A

SEE APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EXHIBIT B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

LAURENCE H. FROMMHAGEN, Petitioner

v.

J. HENRY GLAZER, Respondent

HERBERT W. YANOWITZ, being duly sworn according to law, deposes and says:

1. He is an attorney at law with offices in San Francisco, California.

2. Late in the afternoon of September 1, 1971, affiant was called by Laurence H. Frommhagen (hereinafter called "Frommhagen"), the petitioner herein, who advised affiant that Frommhagen had retained the Honorable Byron N. Scott (hereinafter called "Scott") to represent Frommhagen in filing a petition for a writ of certiorari with this court, but that Frommhagen was concerned about not having heard from Scott or having received a copy of the filed petition.

3. At the request of Frommhagen, on September 2, 1971, affiant telephoned Scott and asked whether Scott would file the petition on behalf of Frommhagen. At no time during the said conversation did Scott indicate in any manner that Scott did not intend to represent Frommhagen before this Court.

/s/ Herbert W. Yanowitz
HERBERT W. YANOWITZ
Suite 1100, 105 Montgomery Street
San Francisco, California 94104

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN FRANCISCO)

Subscribed and sworn to before me this eighth day of September, 1971.

/s/ Jaqueline S. Montoliu
Notary Public in and for said County and State

(her seal)

SUPREME COURT OF THE UNITED STATES

No. A-363, October Term, 1971

LAURENCE H. FROMMHAGEN,
Petitioner

v.

J. HENRY GLAZER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct 4, 1971, without prejudice to the Court's consideration as to whether the application was filed in time.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of September, 1971

LAURENCE H. FROMMHAGEN
Pro Se
P.O. Box 326
Soquel, California 95073

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. A-363

LAURENCE H. FROMMHAGEN, Petitioner

v.

J. HENRY GLAZER, Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable WILLIAM O. DOUGLAS, Associate Justice of the Supreme Court of the United States:

LAURENCE H. FROMMHAGEN, being duly sworn according to law, deposes and says:

1. He is the petitioner in the above-entitled matter and is making this affidavit in support of his application for an extension of time within which to file a petition for writ of certiorari.

2. On September 9, 1971, petitioner transmitted to the Honorable WILLIAM O. DOUGLAS an Application For Extension Of Time To File Petition For Writ Of Certiorari. On

October 3, 1971, petitioner received an Order granting said Application which specified that the Petition For Writ of Certiorari be filed no later than October 4, 1971. In the period between September 9, 1971, and October 3, 1971, petitioner had spoken by telephone with a staff member of the Office of the Honorable WILLIAM O. DOUGLAS on three occasions and had received no assurances, and properly so, that the petitioners' Application would be granted. Petitioner, responding to a sense of hopelessness resulting from his abandonment by his attorney in Washington, D.C., and the lack of any response to his Application to this Court, informed his attorney during the early part of the week of September 27, 1971, that he, the petitioner, believed that the cause was lost and that no further effort should be expended.

3. Petitioner, heartened by the Order granting his Application, will require, by reason of his attorney's commitments and his own commitments, as additional twenty-four days to complete, have printed, and personally deliver to the Court, his Petition for Writ of Certiorari.

4. Petitioner, who is limited in his financial resources, has not wished to commit a portion of those resources until he received some assurance that his out-of-time petition would at least be considered by the Court. Petitioner is not as much concerned by Respondent's libel as he is with the significant issues which he desires to bring to the attention of this Court, most notably the failure of the Courts below to afford petitioner due process and his 'day in court'.

WHEREFORE, your affiant respectfullt prays the Court, consistent with the sixty day provision of Rule 22(1) of the

rules of the Supreme Court, to enter an Order extending the time within which the petitioner may file the Petition for Writ Of Certiorari from the decision of the United States Court Of Appeals For The Ninth Circuit to, and including, October 27, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

Dated: October 3, 1971.

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this fourth day of October, 1971.

/s/ Hilda C. Burchell
Notary Public

(her seal)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he transmitted by mail fully conformed copies of the foregoing Application For Extension Of Time To File Petition For Writ Of Certiorari and the Order Extending Time To File Petition For Writ Of Certiorari, signed by the Honorable WILLIAM O. DOUGLAS on September 27, 1971, to the United Stated Attorney, 450 Golden Gate Avenue, San Francisco, California, on October 4, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

SUPREME COURT OF THE UNITED STATES

No. A-363

LAURENCE H. FROMMHAGEN,
Petitioner

v.

J. HENRY GLAZER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including Oct. 27th, 1971, without prejudice to the Court's consideration as to whether the application was filed in time.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 14th
day of October, 1971.